In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 451

MOSES JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-16) is reported at 333 F.2d 1012.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. A petition for rehearing was denied on August 11, 1964. The petition for a writ of certiorari was filed on September 2, 1964. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether petitioner waived his Sixth Amendment right to be confronted with witnesses when his counsel, in his presence, consented at trial to the introduction of documentary evidence.

2. Whether in a prosecution for making a false statement in violation of 18 U.S.C. 1001 there was sufficient evidence of the *corpus delicti*.

STATEMENT

Petitioner was charged, under an indictment returned in the United States District Court for the Eastern District of Michigan, with knowingly and wilfully violating 18 U.S.C. 1001 by making a false statement to the Federal Communications Commission in a written application for a radiotelephone operator's permit (R. 2a). Petitioner, who was represented by counsel of his choice, waived a jury trial (R. 4a). The court found him guilty (R. 48a) and sentenced him to imprisonment for 18 months, with eligibility for parole at such time as the Parole Board may determine under 18 U.S.C. 4208(a)(2) (R. 50a). On appeal the conviction was affirmed (Pet. App. 15-16).

At the start of the trial, government counsel, "in line with our pretrial conferences on this matter," asked that Gov. Exhibits 1, 2 and 3 be admitted in evidence; the court so ordered when defense counsel stated that he had no objection. Government counsel

stated, "And I believe it is indicated that these records all relate to the defendant, Moses Joseph," and defense counsel agreed, "That is right" (R. 5a-6a). Gov. Ex. 1 is petitioner's application for a restricted radiotelephone operator's permit on F.C.C. Form 753-1, which he signed at the Detroit field office on September 4, 1957 (R. 9a, 49a). Question 10 of this form reads as follows:

> 10. Have you received any convictions in the following respects? (write yes or no) [Petitioner answered this question, "No."]
>
> (a) Conviction of any crime for which the penalty imposed was a fine of $500 or more, or an imprisonment of more than one year.[1]

Gov. Ex. 2 is a photostatic copy of a page from a Law Journal, certified as true by the Clerk of the Wayne County Circuit Court, Michigan, showing a conviction of petitioner in 1934 for armed robbery, for which a sentence of imprisonment from 7½ to 15 years was imposed (R. 51a-52a). Gov. Ex. 3 is a certified copy of the record of petitioner's conviction in a Michigan court for conspiracy to bribe police officers. For this offense, he was sentenced in 1950 to imprisonment for a period of two to five years (R. 53a-56a).

---

[1] At the bottom of the form in a box with capital letters, the following appears: "The United States Criminal Code makes it a criminal offense, punishable by a maximum of 5 years' imprisonment, $10,000 fine, or both, to make a false statement or representation to the F.C.C." (R. 49a).

In testifying on his own behalf, petitioner admitted both the filing of the application (Gov. Ex. 1) (R. 28a) and his previous convictions as shown by Gov. Exhibits 2 and 3 (R. 23a, 24a). Denying that he had made a wilfully false statement, he explained that in signing "No" to Question 10 he thought he was answering only subsection (b), which refers to five specific crimes against the government (R. 28a-29a, 49a). He testified that since 1957 he had received no formal complaint from the F.C.C. (R. 29a).

At the conclusion of the evidence, the court stated (R. 48a):

> It is incredible to the court that there was any doubt whatsoever in the mind of the defendant as to his duty with respect to this form. None whatsoever.
>
> Furthermore, I am not impressed with the testimony of the defendant from the stand as to his credibility.
>
> In short, it is the judgment of this court that the defendant did knowingly and wilfully make the statement which I find in the form, and thus the court finds him guilty as charged in the indictment.

ARGUMENT

1. Petitioner was not deprived of his constitutional rights by receipt of the documentary evidence (Gov. Exhibits 1, 2 and 3) and the stipulation by his counsel that these exhibits related to petitioner. Counsel, in the presence of an accused who indicates no dissent, may certainly make an effective waiver of the

right to confront witnesses. *Diaz* v. *United States*, 223 U.S. 442, 450-453; *Cruzado* v. *People of Puerto Rico*, 210 F.2d 789, 791 (C.A. 1); *Fukunaga* v. *Territory of Hawaii*, 33 F.2d 396, 397 (C.A. 9) certiorari denied, 280 U.S. 593; *Burgess* v. *King*, 130 F.2d 761, 762-763 (C.A. 8); *Grove* v. *United States*, 3 F.2d 965, 966-967 (C.A. 4), certiorari denied, 268 U.S. 691.

In addition, we note that petitioner admitted on the stand that he had executed the signed application and that he had been convicted on the two previous occasions.

2. Petitioner apparently contends that his conviction cannot stand because there was no evidence establishing the *corpus delicti* independent of his extra-judicial admissions. As the court of appeals pointed out, however, the exhibits themselves established the offense, and no extra-judicial admissions were received in evidence (Pet. App. 16). The only admissions made were in petitioner's trial testimony, during which he acknowledged that he had executed the application and that he had been convicted on two occasions.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYBACK,
Attorneys.

OCTOBER, 1964.

★ U. S. GOVERNMENT PRINTING OFFICE: 1964 749229 280